

**DISPUTES REVIEW BOARD RECOMMENDATION**  
**Escalation of Asphalt Aggregates Issue #32**

6 January, 2009

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Ref: US 41 (SR45), From a Point North of Bonita Beach Road to Old US 41,  
Financial Project ID: 195737-1-52-01: WPI#: 1114707, Contract No.: T-1022:  
Lee County: Disputes Review Board hearing regarding entitlement to  
Escalation of Asphalt Aggregates Cost

Dear Sirs:

The Florida Department of Transportation, (FDOT), and Astaldi Construction Corporation, (ACC), requested a hearing concerning the above referenced issue.

**CONTRACTORS POSITION**

We will state the Contractors position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Contractor.

The Contractors position paper has the following statements and references to document their claim for entitlement.

“Milestone #1 of the SA No. 28 acceleration agreement required ACC to have the roadwork completed by January 1, 2006 and the Bridge tie-ins by April 1, 2006. ACC’s subcontractor, Better Roads Inc., (BR) maintained the asphalt price for the road work in anticipation that the roadwork would be completed by the end of 2005. The Contact time was extended 110 calendar days by the Department to July 20, 2006 since the execution of the S.A. No. 28 agreement by the Department.... The time extension granted by FDOT and recognized by the DRB warrant the recovery of the price escalation for asphalt material placed by Better Roads.

On June 2, 2006, BR notified ACC that as a result of the significant delays that had affected the Project, BR would be submitting its claim for the asphalt price increases. Following BR's claim notice, on June 26, 2006, BR submitted a clarification letter of the material unit price increases along with supporting documentation from its vendors and FDOT price indices for fuel and bituminous material.

On July 13, 2006, ACC submitted BR aggregate and haul price increases to KCCS for consideration.

On April 27, 2007, KCCS denied ACC request and noted that Supplemental Specification 9-2.1 provided for price adjustment for the bituminous materials. On May 2, 2007, ACC replied to KCCS' response and again provided its notice of claim for this issue.

Supplemental Specification 9-2.1.1 recognizes that the Department will adjust the bid unit prices for asphalt material to reflect changes. SA No. 28 extended the contract completion date to April 1, 2006, and ACC accepted that any unit price escalation would be an issue only after that date.

KCCS and FDOT previously recognized their responsibility for delay, and agreed to compensate ACC for escalation of concrete aggregates in other claims such as the ACC issue #2 SWFMD Permit that was settled with the Department and paid under S.A No. 78.

ACC requests this DRB Board to recognize that ACC is due additional entitlement for this issue."

## **REBUTTAL**

"The Department fails to recognize that the Department extended the Contract time for delays beyond ACC control by 110 calendar days to July 20, 2006 since the execution of the S.A. No. 28 agreement.

But for these recognized delays, ACC would have completed the asphalt paving earlier. Pursuant to Standard Specification article 5-12.2.2, Claims for Delays, and Standard Specification article 5-12.6.2.1, Compensation for Direct Cost of Delay, ACC is due entitlement for equipment and material costs incurred beyond what reasonable mitigation thereof the Contractor could have undertaken. But for the delay created by the Department, the asphalt could have been placed during contract time and no escalation would have been due; however, due to these delays (delays the DRB has recognized entitlement) the asphalt was placed later, pushed into the rainy season, and effected by escalation, none of which could not have been mitigated or foreseen by ACC.

ACC requests this DRB to recognize that ACC is due recovery for the price escalation of the asphalt material pursuant to article 9.2.1.1.”

## **DEPARTMENT’S POSITION**

We will state the Department’s position by referencing, copying and paraphrasing their position paper and input from the hearing. Should the reader need additional information please see the complete position paper by the Department.

The Department’s position paper has the following statements and references to document their claim for no entitlement to ACC for the escalation of asphalt aggregates.

“Specification 9-3.1 General, page 89 of the 2000 edition of the Standard Specifications for Road and Bridge Construction states in part, “...the Contractor shall accept payment in full at Contract unit bid prices for the actual quantities of work done, and no allowance will be made for increased expense, loss of expected reimbursement, or loss of anticipated profits suffered or claimed by the Contractor, resulting either directly from such alterations, or indirectly from unbalanced allocation among the Contract items of overhead expense on the part of the bidder and subsequent loss of expected reimbursement therefore, or from any other cause.”

There was an apparent increase in the cost of concrete and asphalt aggregates since the project began in 2003. It was expected, through the acceleration agreement (Supplemental Agreement 28) that the paving would be completed prior to January 1, 2006, except for the paving for the bridge approaches which were to be completed by April 1, 2006. According to documentation, the last day of paving occurred on November 12, 2006. ACC is seeking the cost for the escalation of aggregates between April 1, 2006 and November 12, 2006.

ACC submitted their original uncertified notice of claim for \$351,676.22 and zero (0) days by letter dated March 20, 2007. The claim was denied by KCCS letter #671 dated April 27, 2007. ACC then submitted letter no. 425 dated May 2, 2007 as their formal notice of claim for this issue. It too was uncertified.

On November 15, 2007, ACC submitted their request for compensation in the form of a certified Request for Equitable Adjustment. The Department again denied their request stating that compensation for the increase in aggregate costs was not allowed by the Department.

As there is no provision in the Contract allowing for compensation for the increase in Contract pay items, there is no entitlement for the claimed escalation costs of \$259,148.80. In addition, ACC provided no explanation or

substantiation of how the alleged escalation in the price of asphalt aggregates resulted in a 180-day delay.

The Department respectfully asks the Board to find no entitlement as it pertains to this issue.”

## **REBUTTAL**

“As stated in the Department’s position paper, Standard Specification 9-2.1 Items included in payment holds true. The specification does not address escalation of material prices.

ACC cited Specification 9-2.1.1 Bituminous Material as the basis for their claim for increase aggregate costs. This specification does not imply adjustment of bid unit price for the fluctuations in the cost of asphalt **aggregates** *nor any other component material*. Therefore, ACC’s position that they are due entitlement to this specification is inherently flawed.

Specification 5-12.2.2 states, in part, that “the Contractor shall be prohibited from amending either the bases of entitlement or the amount of any compensation or time stated for any and all issues claimed...”

Please note that ACC’s request for entitlement does not meet the requirements of 5-12.2.2 with regards to time, nor does it meet the requirements of 8-7.3.2 with respect to their request for a time extension.”

## **FINDINGS OF FACT**

The Board’s decisions are governed by the plans, specifications (standard, supplemental, technical, special), and the contract. Therefore our recommendation is based on the above referenced documents, the hearing, and the following facts.

1. This Board has been tasked to give recommendations of entitlement only of all issues presented to us. Therefore, we are not providing any indication of what that entitlement is, time and/or money. The Contractor has alluded to, (in their position papers), a number of recommendations of entitlement being given with time. The Board has not made any recommendation with a definite time associated with that entitlement. It is the Board’s understanding, (from our pre-hearing conference), that the parties wish to negotiate what that entitlement is, not have the Board state a specific amount of that entitlement at this time.

2. The Contractor has demonstrated that there was an increase in aggregate costs. This increase took place after the original and accelerated contract time had expired.
3. ACC submitted a certified claim to the Department regarding this issue on 15 November, 2007. The certified amount of the claim was \$259,148.80. ACC's position paper to the DRB regarding this issue has the amount of \$390,360.60 requested.
5. Specification 5-12.3 states in part, *the Contractor shall be prohibited from amending either the bases of entitlement or the amount of any compensation or time stated for any and all issues claimed in the Contractor's written claim hereunder, and any circuit court, arbitration, or other formal claims resolution proceeding shall be limited solely to the bases of entitlement and the amount of any compensation or time stated for any and all issues claimed in the Contractor's written claim submitted hereunder. This shall not, however, preclude a Contractor from withdrawing or reducing any of the bases of entitlement and the amount of any compensation or time stated for any and all issues claimed in the Contractor's written claim submitted herein at any time.*
6. Specification 9-2.1.1 Bituminous Material states in part, *The Department will adjust the bid unit price for Bituminous Material to reflect changes, both increases and decreases, in the Asphalt Index price of bituminous material from that in effect during the month bids were received for this contract....*

*Price adjustments will be made for all bituminous material incorporated into asphalt pavement whether paid for under a separate bid item... or under any other items that include the cost of bituminous material.*

The interpretation provided by the Department's representative (KCCS) and ACC's subcontractor, (Better Roads), was that asphalt aggregate was not a part of this bituminous material adjustment specification. This definition was given to all the parties at the hearing.

7. ACC was notified by Better Roads of a price increase resulting from significant project delays in a June 2, 2006, letter (not provided to the Board). Following Better Roads letter to ACC of June 2, 2006, Better Roads clarified its material unit prices to Mr. Jack Morgan (ACC) in a June 26, 2006, letter. On July 13, 2006, ACC submitted a request to KCCS from Better Roads for a price increase pertaining to Aggregates and hauling of Asphalt. No mention of this being a claim is made at this time. Paving was completed on November 12, 2006. On March 6, 2007, Better Roads writes ACC a letter, and for the first time in the

correspondence provided to the Board do we find mention of this being a claim (noted in the letter “Re: Asphalt Pricing (Delay Claim)”). On March 20, 2007, ACC submits a letter to KCCS and marks in the subject “Notice of Claim”.

8. ACC did not meet the requirements of specification sections 5-12.2.1, 5-12.2.2, and 8-7.3.2.

## **RECOMMENDATION**

The Board finds that there is no entitlement to ACC for the escalation of asphalt aggregates. The specifications which govern this contract and which the Board had to base our recommendations on do not allow escalation of aggregate costs. The Board does recognize that there are material cost(s) increases in contracts that significantly extend past the original contract time.

The Board sincerely appreciates the cooperation of all parties and the information presented for our review in making this recommendation.

The Board unanimously reached the recommendation and reminds the parties that it is only a recommendation. If the Board has not heard from either party within 15 days of receiving this recommendation, the recommendation will be considered accepted by both parties.

Submitted by the Disputes Review Board

Don Henderson, Chairman   Jack Norton, Member   Frank Consoli, Member

Signed for and with concurrence of all members



Don Henderson, PE